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No. 429

In the Supreme Court of the United States

OCTOBER TERM, 1960

VIEW CREST GARDEN APARTMENTS, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The oral opinion of the district court (R. 88-103) is not reported. The opinion of the court of appeals (Pet. App. 1A-9A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1960 (R. 125-133). The petition for a writ of certiorari was filed on September 21, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Government brought an action to foreclose a mortgage insured under Title IX of the National Housing Act, as amended. The question presented is whether it is beyond the discretionary power of a federal equity court to appoint a receiver to collect the rents and manage the property during the pendency of the foreclosure action in circumstances where (1) the mortgagor is insolvent; (2) the security is inadequate; and (3) there had been and were likely to be further delays in accomplishing foreclosure.

STATUTE AND MORTGAGE INVOLVED

The relevant provisions of the National Housing Act, 48 Stat. 1246, as amended, 12 U.S.C. 1702, *et seq.*, regulations, and the national defense housing insured mortgage involved are set out in the Appendix, *infra*, pp. 12-17.

STATEMENT

This is a suit brought by the United States to foreclose a national defense housing mortgage, insured by the United States through the Federal Housing Administration (FHA), under Section 908 of Title IX of the National Housing Act, 12 U.S.C. 1750g, *infra*, p. 15.

The national defense housing mortgage program.—Title IX, 12 U.S.C. 1750, *et seq.*, was added to the Act in 1951. It was designed to supplement the programs of mortgage insurance, which had been previously established in other titles of the Act, by providing for the insurance of "national defense housing * * * mortgages" (12 U.S.C. 1750a), "in order to assist in providing adequate housing in areas which the President * * * shall have determined to be critical defense housing areas" (12 U.S.C. 1750b).

Title IX, and the regulations (24 C.F.R.) adopted by the Federal Housing Commissioner under authority of Section 907, 12 U.S.C. 1750f, set forth the procedure which must be followed in order to obtain insurance on national defense housing mortgages. First, the mortgagee (who must have previously been approved by the FHA) and the sponsors of the project to be financed by the mortgage must submit an "application for mortgage insurance" on an approved FHA form, giving information required by the FHA respecting the project. 24 C.F.R. 232.1(a). On approval of the application, the FHA issues a "commitment" of insurance, setting forth the terms and conditions under which the obligation secured by the mortgage will be insured. 12 U.S.C. 1750b; 24 C.F.R. 232.2(a), *infra*, p. 15. The mortgage agreement then must be executed on a printed form approved by the Commissioner; no changes in the written form may be made without his prior written approval. 24 C.F.R. 232.3, *infra*, p. 16. If the mortgage meets the terms and conditions set forth in the commitment, it is accepted for insurance.

Under the agreement of insurance between the mortgagee and the FHA, the mortgagee, in the event of default, becomes entitled to payment of insurance benefits if it either (1) transfers the mortgage to the FHA or (2) obtains title to the mortgaged property by foreclosure or otherwise, and transfers the title to the FHA. 12 U.S.C. 1713(g), *infra*, pp. 12-13. If the mortgage itself is transferred, the FHA is authorized to institute foreclosure proceedings and to exercise all the rights of the mortgagee under the mortgage. 12 U.S.C. 1713(k), *infra*, p. 13.

The facts of this case.—A typical national defense housing insured mortgage was executed on May 1, 1952, between petitioner, View Crest Garden Apartments, Inc., as mortgagor, and the National Bank of Commerce of Seattle, as mortgagee (R. 5). The accompanying promissory note for $1,965,000 was executed by the petitioner in favor of the Bank and the FHA insured the note (R. 5). Both the mortgage and the note were executed on printed FHA forms. The printed portion of the mortgage expressly provided that, in the event of default, the mortgagee, in any action to foreclose, would be entitled to the appointment of a receiver to collect the rents from the mortgaged premises which become due during the pendency of a foreclosure suit, and to apply them to the balance due on the debt (see *infra*, pp. 16-17).

On April 16, 1953, the Bank assigned all its rights, title, and interest in the note and mortgage to the Federal National Mortgage Association (R. 9). After petitioner subsequently defaulted, the FHA paid the accelerated unpaid balance, and in return, on August

7, 1956, the FNMA assigned the note to the FHA (R. 10). On December 1, 1956, the FHA entered into a modification agreement with the mortgagor to cure the first default (R. 11-15). Thereafter, another default occurred (R. 15). On March 18, 1958, when the United States instituted this foreclosure action, the mortgagor was in default in an amount exceeding $1,950,000 (R. 36, 44). An independent appraisal report has set the value of the property at $762,000, indicating a deficiency at foreclosure of more than $1,000,000.

In its complaint in the foreclosure suit, the Government sought, *inter alia*, the appointment of a receiver in accordance with the express terms of the mortgage (R. 18). The district court, however, denied the Government's application on the ground that under Washington law, which it deemed controlling, an insufficient showing had been made to warrant appointment of a receiver (R. 58-60). The Government took an interlocutory appeal from this order under 28 U.S.C. 1292(b). The court of appeals held that federal, and not state, law governed the relations between the United States and the parties to the mortgage and remanded the case to the district court with instructions to determine whether, under federal law, the circumstances warranted appointment of a receiver. *United States* v. *View Crest Garden Apts., Inc.*, 268 F. 2d 380. This Court denied certiorari, 361 U.S. 884.

On remand, the district court found (1) that the property mortgaged was inadequate in value to discharge the debt; (2) that View Crest would be unable

to satisfy the deficiency, and (3) that there had been and were likely to be further delays in accomplishing foreclosure (R. 88-102). In these circumstances, the court concluded that "the equities should be resolved in favor of the United States as mortgagee" (R. 102), and accordingly entered an order appointing a receiver with power to collect rents and manage the property (R. 79). The court of appeals affirmed (Pet. App. 1A-9A).

ARGUMENT

The court of appeals held that the district court "acted well within the discretionary powers a court of equity exercises in appointing a receiver" to collect the rents and manage the mortgaged property pending foreclosure where it was satisfied that the security was inadequate, the mortgagor was insolvent, and prompt foreclosure was impossible or impracticable (Pet. App. 9A). This decision is plainly correct, is in full accord with the decisions of this Court, and is not inconsistent with any other federal decision.

1. Petitioners' contention is that, under Washington law, the Government was not entitled to the appointment of a receiver. But the court of appeals held in its earlier opinion that federal, not state, law governed the Government's remedies under the National Housing Act. This determination was the sole issue raised by petitioners in their petition for certiorari which was denied. 361 U.S. 884. Petitioners, in again seeking review of this issue, have presented

no new arguments of any substance. Moreover, this question of choice of law is not properly before the Court, since it was not raised in the court below when the case was brought there by petitioner for the second time. The sole point relied upon by petitioner was that "[u]nder Federal Law, there was no authority to appoint a Receiver of the property or to impound the rents and profits" (R. 87).

In any event, for the reasons set forth in detail in our brief in opposition to the first petition for certiorari filed in this litigation, we submit that the choice of federal law by the court below was clearly correct. See the Government's Brief in Opposition in No. 372, Oct. Term, 1959, pp. 6-11.

2. Under federal law, the district court was clearly acting within its proper discretion in appointing a receiver. Ordinarily where the mortgagor is permitted to remain in possession of the property, he is entitled to take the rents and profits even after default. *Kountze* v. *Omaha Hotel Co.*, 107 U.S. 378, 395; *Totten* v. *Harlowe*, 90 F. 2d 377, 380 (C.A. D.C.). But it is settled, under federal law, that the parties to a mortgage may provide for the payment of rents and profits to the mortgagee while the mortgagor remains in possession. *Freedman's Saving and Trust Co.* v. *Shepherd*, 127 U.S. 494, 502; *Atlantic Trust Co.* v. *Dana*, 128 Fed. 209 (C.A. 8); *Mortgage Loan Co.* v. *Livingston*, 45 F. 2d 28, 31 (C.A. 8); *Associated Co.* v. *Greenhut*, 66 F. 2d 128, 129 (C.A. 3); *McNamara* v. *Hart*, 83 F. 2d 649, 652 (C.A. 8); *Tower Grove Bank & Trust Co.* v. *Wein-*

stein, 119 F. 2d 120, 122 (C.A. 8); *New York Trust Co.* v. *Michigan Traction Co.*, 193 Fed. 175, 179 (W.D. Mich.); *Colonial Trust Co.* v. *Stone Harbor Electric Light & Power Co.*, 280 Fed. 245, 246-247 (D. N.J.). The mortgage specifically provided that the mortgagee was entitled upon default to the collection of rents and, after the start of an action to foreclose, "to the appointment of a receiver of the rents and profits of the mortgaged premises as a matter of right * * *" (see *infra*, p. 16). Having been assigned all the rights, title, and interest of the mortgagee (R. 8-9), the Government was thereby entitled after default and the institution of a foreclosure action—and particularly since View Crest is insolvent and the security is inadequate—to the appointment of a receiver to collect rents and profits.

Here the receiver was given the additional power to manage and operate the property. While the mortgage agreement does not provide for the appointment of a receiver with this particular power, it states that "nothing herein is to be construed to deprive the holder of the mortgage of any other right, remedy, or privilege it may now have under the law to have a receiver appointed" (see *infra*, p. 17). And under federal law, courts of equity, in the absence of a specific provision in the mortgage agreement, have the power to take charge of mortgaged property by appointment of a receiver and thereby preserve the corpus and the rents and profits where (1) the debtor is insolvent, (2) the mortgaged property is inadequate security for the debt, and (3) there is good

cause to believe that it will be wasted or deteriorated in the hands of the mortgagor. *Kountze* v. *Omaha Hotel Co.*, *supra*, 107 U.S. at 395; *Freedman's Saving and Trust Co.* v. *Shepherd*, *supra*; *Shepherd* v. *Pepper*, 133 U.S. 626, 652; *Totten* v. *Harlowe*, *supra*, 90 F. 2d at 380; *Central Trust Co. of New York* v. *Chattanooga R. & C.R. Co.*, 94 Fed. 275, 281-282 (C.A. 5). In such circumstances, the Court in *Grant* v. *Phoenix Life Ins. Co.*, 121 U.S. 105, upheld the appointment of a receiver with power to lease and control the property (*id.* at 111, 116-117). The Court of Appeals for the Fifth Circuit in *Central Trust Co. of New York* v. *Chattanooga, R. & C. R. Co.*, *supra*, 94 Fed. at 281-282, stated:

> When the mortgaged property is not of value sufficient to secure the payment of the mortgage debt, or when its sufficiency becomes substantially doubtful, and the mortgagor is insolvent, accruing interest matured and unpaid, like accruing taxes due and unpaid, takes the character of waste as clearly and distinctively as deteriorations by the cutting of timber, suffering delapidation, etc. * * *. In such cases courts of equity always have the power to take charge of the property by means of a receiver, and to preserve not only the corpus, but the rents and profits for the satisfaction of the debt.[1]

Similarly, in *Totten* v. *Harlowe*, *supra*, the court of appeals held that conditions which make an immediate

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[1] The mortgage in that case provided for the mortgagor to take possession of the property after default and to operate it. But the above quotation from the court's opinion concerns, as it clearly shows, the inherent power of an equity court, not the mortgage agreement.

sale impractical or impossible justify the granting of the power to manage and operate the property (90 F. 2d at 380):

> In such circumstances, the loss inevitable in the delay takes the character of waste as clearly and distinctly as deterioration by the failure to make repairs or the cutting of timber, etc.

See also *Totten* v. *Harlowe*, 108 F. 2d 8, 9 (C.A. D.C.); *Garden Homes, Inc.* v. *United States*, 200 F. 2d 299, 301 (C.A. 1).

In the instant case it is clear that View Crest is insolvent, and that the mortgaged property was and is inadequate in value to satisfy the debt. Further, there is little question but that from the beginning prompt foreclosure has been impossible or at least impracticable. There have been constant delays[2] and petitioners admit that foreclosure cannot be accomplished expeditiously (Pet. App. 8A-9A, fn. 7). In these circumstances, it was not beyond the discretionary power of a court of equity to appoint a receiver for the preservation of the property.[3]

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[2] The district court concluded that petitioners were partially responsible for the delays (see R. 100-101).

[3] Petitioners' assertion (Pet. 17-22) that the appointment of a receiver in the circumstances of this case is a deprivation of property without due process of law is frivolous. As pointed out above, it has long been recognized that a receiver may be appointed to take charge of the property in order to preserve the corpus and the rents and profits. There has never been a suggestion that where a court of equity appoints a receiver after a full and complete hearing in circumstances such as these—*i.e.*, where because the mortgagor is insolvent and the mortgaged property is worth less

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1960.

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than the debt, the mortgagor has little further interest in the property—the mortgagor has been deprived of property without due process of law.

There is no greater merit to petitioners' claim (Pet. 7-10) that the decision of the court below is in conflict with *John Hancock Mutual Life Insurance Co.* v. *United States*, 341 F. 2d 1002, No. 18, this Term. In the *John Hancock* case the United States was the second mortgagee of real estate which was judicially foreclosed and sold to satisfy the first mortgagor's liens in a proceeding to which the United States was made a party under 28 U.S.C. 2410. The question before the Court is whether the United States can redeem within one year from the date of sale, as provided by 28 U.S.C. 2410(c), despite a conflicting state statute giving the mortgagor the exclusive right to redeem within that period. The present case raises the entirely different question whether the district court in exercising its equity powers properly appointed a receiver, prior to foreclosure, under federal law. Indeed the distinction between the situation involved in *John Hancock* with relation to the redemption rights and the situation presented here was fully recognized in the first decision of the court below which emphasized that this case presents no issue with respect to the mortgagor's right of redemption. *United States* v. *Viewcrest Garden Apts., Inc.*, *supra*, 268 F. 2d at 383.

APPENDIX

1. The National Housing Act, 48 Stat. 1246, as amended, 12 U.S.C. 1702, *et seq.*, provides in pertinent part:

§ 1707. Definitions.

As used in section 1709 of this title—

(a) The term "mortgage" means a first mortgage on real estate, in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed; and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State, in which the real estate is located, together with the credit instruments, if any, secured thereby.

* * * *

§ 1713. Rental Housing Insurance.

* * * *

(g) Payment of insurance after default.

The failure of the mortgagor to make any payment due under or provided to be paid by the terms of a mortgage insured under this section shall be considered a default under such mortgage and, if such default continues for a period of thirty days, the mortgagee shall be entitled to receive the benefits of the insurance as hereinafter provided, upon assignment, transfer, and delivery to the Commissioner, within a period and in accordance with rules and regulations to

be prescribed by the Commissioner of (1) all rights and interests arising under the mortgage so in default; (2) all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transactions; * * * *Provided*, That the mortgagee in the event of a default under the mortgage may, at its option and in accordance with regulations of, and in a period to be determined by, the Commissioner, proceed to foreclose on and obtain possession of or otherwise acquire such property from the mortgagor after default, and receive the benefits of the insurance as herein provided, upon (1) the prompt conveyance to the Commissioner of title to the property which meets the requirements of the rules and regulations of the Commissioner in force at the time the mortgage was insured and which is evidenced in the manner prescribed by such rules and regulations, and (2) the assignment to him of all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction or foreclosure proceedings, except such claims that may have been released with the consent of the Commissioner. * * *

* * * *

(k) Acquisition of property by conveyance or disclosure.

The Commissioner is authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion.

The Commissioner shall so acquire possession of and title to the property by voluntary conveyance or institute foreclosure proceedings as provided in this section within a period of one year from the date on which any such mortgage becomes in default under its terms or under the regulations prescribed by the Commissioner: *Provided*, That the foregoing provisions shall not be construed in any manner to limit the power of the Commissioner to foreclose on the mortgaged property after the expiration of such period, or the right of the mortgagor to reinstate the mortgage by the payment, prior to the expiration of such period, of all delinquencies thereunder. * * * Pending such acquisition by voluntary conveyance or by foreclosure, the Commissioner is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as may be necessary to preserve or protect the lien of such mortgage.

§ 1750. Definitions.

As used in this subchapter, the terms "mortgage", "first mortgage", "mortgagee", "mortgagor", * * * shall have the same meaning as in section 1707 of this title.

§ 1750f. Rules and regulations.

The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter.

§ 1750g. Insurance of additional mortgages.

(a) Authority of Commissioner.

In addition to mortgages insured under section 1750b of this title, the Commissioner is authorized to insure mortgages as defined in section 1750 of this title * * * which are eligible for insurance as hereinafter provided.

(b) Eligibility requirements; release of part of property.

To be eligible for insurance under this section a mortgage shall meet the following conditions:

(1) The mortgaged property shall be held by a mortgagor approved by the Commissioner. * * *

* * * * *

(f) Applicability of section 1713(k), (l) of this title.

The provisions of subsections (k) and (l) of section 1713 of this title shall be applicable to mortgages insured under this section and to property acquired by the Commissioner hereunder, except that as applied to such mortgages and property (1) all references in such subsections to the "Housing Fund" shall be construed to refer to the National Defense Housing Insurance Fund, and (2) the reference therein to "subsection (g)" shall be construed to refer to subsection (c) of this section.

2. 24 C.F.R. 232.2 provides in pertinent part:

Issuance of commitment. (a) Upon approval of an application a commitment will be issued setting forth the terms and conditions upon which the mortgage will be insured, including special requirements applicable to the project

and requiring the submission in final form within a time specified of all appropriate documents, drawings, plans, specifications, and other instruments evidencing full compliance satisfactory to the Commissioner with the provisions of this part and with such terms and conditions.

3. 24 C.F.R. 232.3 provides in pertinent part:

> *Mortgage forms.* The mortgage must be executed upon a printed from approved by the Commissioner for use in the jurisdiction in which the property covered by the mortgage is situated, by a mortgagor with the qualifications hereinafter provided in this part * * *. Any changes in the printed form desired by the mortgagor and mortgagee must receive prior written approval of the Commissioner.. * * *

4. The pertinent provisions of the national defense housing insured mortgage involved in this case (FHA Form No. 8189-d), are as follows:

> That if there is any default, regardless of whether or not the Mortgagee elects to foreclose this mortgage, the Mortgagee may collect all rents which may become due on the above property, deduct therefrom any necessary operating expenses and five per centum (5%) of the gross rents collected as compensation for making the collections, and apply the remainder on the balance due on the mortgage.
>
> * * * *
>
> That the holder of this mortgage, in any action to foreclose, shall be entitled to the appointment of a receiver of the rents and profits of the mortgaged premises as a matter of right and without notice, with power to collect the rents,

issues, and profits of said mortgaged premises, due and becoming due during the pendency of such foreclosure suit, such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage, without regard to the value of the mortgaged premises or the solvency of any person or persons liable for the payment of the mortgage indebtedness. The Mortgagor for himself and any subsequent owner hereby waives any and all defenses to the application for a receiver as above and hereby specifically consents to such appointment without notice, but nothing herein contained is to be construed to deprive the holder of the mortgage of any other right, remedy, or privilege it may now have under the law to have a receiver appointed.

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